ANGELINE GALBRAITH
(ON RECONSIDERATION)

IBLA 85-256 Decided November 14, 1988
97 IBLA 132, 94 I.D. 151 (1987)

Reconsideration of decision reported as Angeline Galbraith, 97 IBLA 132, 94 I.D. 151 (1987).

Prior decision reaffirmed as explained.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

Use of land solely for berrypicking may be sufficient to establish entitlement to a Native allotment therefor, where the use shown is substantial and it is also shown that the use was at least potentially exclusive of others.

APPEARANCES: Mark Regan, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for Galbraith; Lance B. Nelson, Esq., Assistant Attorney General, Anchorage, Alaska, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

By decision dated May 6, 1987, reported at 97 IBLA 132, 94 I.D. 151, this Board set aside a decision of the Fairbanks District Office, Bureau of Land Management (BLM), rejecting Angeline Galbraith's Native allotment application F-14780, and directed BLM to issue a contest complaint chal-lenging the application. In the course of that decision, the Board noted that the record did not establish that Galbraith had intended to apply for land described as lot 5, sec. 6, T. 2 S., R. 2 W., Fairbanks Meridian.
In addition, we also held that the evidence of record failed to establish that appellant's alleged use and occupancy was sufficient to constitute substantially continuous use and occupancy at least potentially exclusive of others as required under the Native Allotment Act of 1906, 34 Stat. 197, as amended, 43 U.S.C. || 270-1 through 270-3 (1970). Accordingly, we held that Galbraith should be afforded the opportunity to participate in a fact-finding hearing before any final determination was made as to the accept- ability of her allotment application.

Subsequent to the issuance of this decision, counsel for Galbraith filed a petition seeking reconsideration of that part of the above-referenced decision which had examined appellant's compliance with the requirements of the 1906 Act. The petition asserted both that the Board

lacked authority to raise this issue sua sponte and also argued that the Board was, in effect, adopting new legal standards without the benefit of briefing from any party to the case.

By Order dated August 18, 1987, this Board rejected the assertion that it was without authority to examine the question of the adequacy of appel- lant's compliance with the use and occupancy requirements of the 1906 Act. Noting that the Ninth Circuit Court of Appeals had expressly recognized that "so long as legal title remains in the government, there is continu- ing jurisdiction in the Department to consider all issues in land claims" (Schade v. Andrus, 638 F.2d 122, 125 (1981)), the Board concluded that "the jurisdiction of the Board having been properly invoked by appellant, the authority of the Board to examine any and all questions relating to petitioner's entitlement to an allotment cannot be gainsaid" (Order of Aug. 18, 1987, at 2).

With reference to the assertion that the Board had adopted a new legal standard, we noted that, in our view, "our decision was not the promulgation of a new rule; rather, it was the reaffirmation of the consistent Departmen-tal approach to Native allotment adjudication." Nevertheless, we recognized that petitioner might not view this determination as such. Accordingly, in order to make sure that petitioner had a proper forum in which to present all arguments which were deemed relevant, we granted the petition for recon-sideration "for the limited purpose of reexamining the substantive conclu- sions set forth on pages 165 to 170 of our decision" (Order of Aug. 18, 1987, at 3).

Petitioner thereafter submitted a substantive brief explaining in detail its interpretation of the Board's "new" rule and why she believed that it was in error. Counsel for the State of Alaska also submitted a brief, essentially arguing that the prior Board decision was correct and should be reaffirmed. Before examining these various contentions, it will be helpful to briefly recapitulate the discussion from our prior decision around which the present controversy revolves.

Therein, with reference to whether the record established that Galbraith had used and occupied the land in question to the potential exclu-sion of others, we first adverted to the applicant's own affidavit, in which she declared that she would "go on the land every summer and stay several days." Angeline Galbraith, supra at 165, 94 I.D. at 169. Relying on deci-sions such as United States v. Estabrook, 94 IBLA 38 (1986), Jack Gosuk, 22 IBLA 392 (1975), and Gregory Anelon, Sr., 21 IBLA 230 (1975), we noted that mere use of the land for a few days each year, absent the presence of physical improvements thereon, 1/ could not constitute substantially contin-uous use and occupancy potentially exclusive of others. We concluded that,

1/ Physical improvements, of course, would serve to give notice to the world of the prior appropriation of the land during any period that the applicant was not physically present thereon. Thus, while improvements are clearly not necessary in every case to show potential exclusivity, they

on the basis of the present record, the applicant's admittedly limited use of the land, when coupled with the absence of any physical evidence which might apprise others of her asserted claim thereto, was simply inadequate to support the Fairbanks District Office conclusion that she had shown the necessary use and occupancy of the land now sought.

We next turned to a more general consideration of the problems which arise where berrypicking is the primary use alleged. As an initial matter, we focussed upon what we termed "an apparent misinterpretation" of adjudica-tion guidelines issued by Assistant Secretary Horton on October 18, 1973. After setting forth the relevant text of these guidelines, we continued:

> Contrary to the interpretation seemingly espoused in the decision below, these guidelines do not provide support for the conclusion that land used merely as a site for berrypicking, without more, ever qualifies for an allotment. What these stan- dards do provide is that evidence of berrypicking as well as evidence of fishing, hunting, and trapping may be considered in determining the existence of substantially continuous use and occupancy such as would be at least potentially exclusive of others. Allegations of berrypicking and the observed presence of berrypicking areas do not constitute evidence of berrypicking within the meaning of these guidelines. Rather, as is made clear in the case of fishing, hunting and trapping, where the example of fish-drying racks is provided, or campsites, where the guide- lines mention tent, tent frame, temporary shelters, fire pits and cleared areas, it is physical evidence of berrypicking which is relevant. [Emphasis in original.]

Id. at 168, 94 I.D. at 170.

As we noted in Galbraith, the presence of physical evidence goes to the question of potential exclusivity. Just as a visual sighting of a Native using a parcel of land would serve to apprise other individuals that the land was under occupancy, physical evidence of such use would be equally effective in alerting third parties to the existence of an outstand-ing claim to the land even when the Native was not present. 2/ Thus, we noted:

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fn. 1 (continued)
could serve to establish a right to possession of land where the amount of actual use occurring would not be deemed sufficient to put a third party on notice that the land was under the claim of another. See generally, United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981).

2/ Moreover, there was a third way in which individuals could be put on notice of the claim of another. Thus, the regulations implementing the Native Allotment Act of 1906, clearly anticipated that Natives could file allotment applications before commencing any use of the parcel. See 43 CFR 2212.9-3(f) (1970), which granted the applicant 6 years after the filing of the application for allotment in which to complete the required 5 years use

> A claimant need not show that he or she actually excluded others from using the land sought; rather, a claimant must show that the nature of the use was such that, under normal circumstances, any person on the land knew or should have known it was subject to a prior claim. Thus, actual occupancy on the land, or the presence of physical structures and man-made artifacts, such as tent frames and fish drying racks, might well engender a recognition that someone was appropriating the land. No reasonable person would come to a similar conclusion merely because berries had been picked in the area.

Id. at 169; 94 I.D. at 171.

Petitioner argues that the above analysis constitutes a sharp break with past Departmental policy. In support of this assertion, petitioner invites our attention to the circumstances surrounding the formulation of the Horton adjudication guidelines. Petitioner notes that, as originally proposed, the section relating to use and occupancy evidence was consider- ably briefer than what was finally adopted. These initial guidelines provided:

> On-the-ground BLM examination must verify the applicants claim with actual substantial physical evidence such as:
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> a. Dwelling
>
> b. Campsite -- evidence of tent or temporary shelter, fire pits, cleared area
>
> c. Fish wheel
>
> d. Dock or boat landing
>
> e. Trails

Memorandum establishing procedures for processing of Alaska Native Allotment Applications, dated June 3, 1973, at 3.

Petitioner notes that this initial set of guidelines elicited a number of objections. Both the Federal-State Land Use Planning Commission and the Director of the Bureau of Indian Affairs (BIA) submitted comments critical of some of the guidelines. See Petitioner's Brief, Exhs. B and C.

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fn. 2 (continued)
and occupancy which was a prerequisite to an allotment. During this period, the land within the application would, by the force of the application,
be segregated from other forms of appropriation. See 43 CFR 2212.9-3(e) (1970). All other potential appropriators of the land would, thereby,
be put on constructive notice that the land was not available for their appropriation.

In particular, the Director, BIA, focussed on the language of the initial guidelines set forth above. He noted that many Native uses did not leave permanent physical evidence. Thus, he asked rhetorically, "How are you going to see a tent when the season of use is over and the tent has been taken home to the village?" (Exh. C at 3). After reviewing other similar problems, he recommended that "BLM should believe the circumstantial and substantiating testimony if there is anything in the field to back it up" (Exh. C at 4 (emphasis in original)). We note, however, that the Director, BIA, did not mention berrypicking in his letter.

Berrypicking was briefly adverted to in the submission by the Federal-State Land Use Planning Commission. Thus, in its review of the initial guidelines relating to use and occupancy, it, too, focussed on the failure of the guidelines to take into consideration uses of the land which did not result in a physical alteration thereof. The Commission suggested that, as a result of this omission, the new guidelines might actually be more restrictive than the old standards. It referenced both a 1970 Solicitor's Opinion, Allotment of Land to Alaska Natives, M-36662, 71 I.D 340, and a May 20, 1970, memorandum from the Alaska State Director. The Commission quoted the following language from the State Director's memorandum:

> [T]he field report must contain a sufficient description of the land, its improvements and observed uses to verify the claimed use. An allotment for berrypicking or woodcutting is hardly justifiable if there are no berries or wood. Uses by individual Natives may include homes, cabinsites, fish, camps, woodcutting, berrypicking, harvesting wild root crops, vegetable gardens, hunting, trapping, reindeer corrals, and headquarter sites for some or all of these activities. Use of a specific tract by the entire community for one or all of these purposes does not entitle an individual Native to an allotment of the tract.

(Exh. B at 6). In view of the foregoing, the Commission made the following recommendation:

> It seems to us that the policy statements set out above adequately discuss the primary principles which should govern the promulgation of use and occupancy criteria. First, such criteria must take sufficient cognizance of traditional Native land uses and life styles in the various regions of Alaska. Second, use and occupancy must be substantial, actual, and potentially exclusive of others in order to provide notice to subsequent entrymen that the lands in question are subject to a prior claim.

(Exh. B at 6).

Petitioner notes that, subsequent to these submissions, the Horton guidelines were amended. Petitioner argues that a fair reading of the second Horton memorandum supports the following conclusions about Native use and occupancy:

1. "Substantial physical evidence" of use is not required.

> 2. Adequate evidence may consist of affidavits from people who can confirm a Native's use and occupancy. It must be correlated with the field examiner's "physical findings," but these findings need not mention "improvements"; "vegetation" and "resources on the land" will also be sufficient.
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> 3. Assistant Secretary Horton's list of acceptable uses is not meant to be exhaustive, and should not be read as a restriction against consideration of other possibly acceptable uses.
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> 4. Berrypicking, as well as fishing, hunting, trapping, and other uses which do not necessarily lead to alterations to, or improvements on, land, are acceptable uses under the Native Allotment Act.

(Petitioner's Brief at 7-8).

We have carefully considered petitioner's arguments. At the outset, we wish to underline a point which may not have been made with sufficient clarity in our original decision. We have never questioned whether berry- picking is an acceptable use under the Native Allotment Act. The problems to which we adverted in our prior decision related to two subsidiary ques- tions. First, whether and in what circumstances berrypicking, by itself, could be deemed a "substantial" use, and, second, when it might be judged "potentially exclusive of others."

The questions of substantiality and potential exclusivity, while related, actually involve differing considerations. Thus, the applicable regulation expressly notes, in defining the term "substantially continuous use and occupancy," that the use and occupancy contemplated "must be sub- stantial actual possession and use of the land." 43 CFR 2561.0-5(a). Cer- tain uses, by their nature, would necessarily result in "substantial actual possession and use of the land." Thus, it is difficult to ascertain how land containing a house or cabin, or reindeer corrals or vegetable gardens or land used as a headquarters site could not be deemed to manifest the substantiality of use required by the regulations.

Other uses, however, including berrypicking, do not necessarily impart the element of substantiality. In these cases, the critical question is not whether the use occurred at all, but rather the quantum of use. Thus, in the Estabrook case, which involved hunting, we noted that the amount of use alleged therein (two visits per year, varying in duration from a few days to a week per visit) did not constitute substantial actual possession and use of the land but rather was properly characterized as "intermittent." Supra at 53-54.

Generally speaking, it can be seen that where a use is "intermittent," it will also not be potentially exclusive of others. But, it is also possible that the claimed use will be lacking in the requisite potential exclusivity even where the use is, itself, substantial. Thus, an individual Native could claim daily use of a trail. While the nature of this use is not one which necessarily gives rise to a finding of substantiality, the

frequency of use manifested would certainly provide a sufficient quantum to support a finding of substantially continuous use and occupancy. If, however, the record also established that many Natives used this trail on the same basis as the applicant, the allotment application would be properly rejected. This rejection would not be based on a failure to show substan- tially continuous use and occupancy but rather on the inability of the applicant to show that the use alleged was, at least potentially, exclusive of others.

Admittedly, where the question is potential exclusivity rather than substantiality of use, witness statements may be very relevant. But, even here, the weight which may be accorded such statements varies according to the physical situs of the land as well as the use asserted. If the land is physically remote, with the potential for any use accordingly low, wit- ness statements may be critical in establishing that the use was at least potentially exclusive of others. 3/ Where, however, as in the instant case, the parcel in question lies astride a well-traveled road in the proximity of a populated area, witness statements attesting to the exclusivity of the claimed use are of limited probative impact, absent a showing that the individuals attesting to the exclusive nature of the use were in a position to properly formulate such a conclusion. Witness statements, of course, are irrelevant where the use claimed is, itself, not substantial, since, at best, they could only establish that the use occurred, not that the use was substantial.

We recognize that our original decision may have left the impression that under no circumstances could berrypicking, by itself, be deemed a qualifying use. This was not our intent. We did, however, wish to focus on the problems presented by uses such as berrypicking both with respect to the substantiality of the use alleged and the question of potential exclusivity. Correctly understood, we believe that our original decision reaffirmed the traditional Departmental adjudicatory principles. Indeed, we note that the Federal-State Land Use Planning Commission echoed our overriding concern in the letter which it submitted in reference to the initial Horton guidelines. Thus, after suggesting that the initial guidelines might be too restrictive, the Commission argued that the criteria utilized should take sufficient cognizance of traditional Native land uses and life styles in the various areas in Alaska and also that the use and occupancy "must be substantial, actual, and potentially exclusive of others in order to provide notice to subsequent entrymen that the lands in question are subject to a prior claim" (Exh. B at 6 (emphasis supplied)). This, indeed, is the ultimate concern animating our prior decision.

3/ The relevance of witness statements to the question of exclusivity of use was recognized in the final Horton guidelines. Thus, under "Native Community Use," the guidelines provided: "Allotment filings that are in conflict with areas of prior Native community use must be denied. The determination of whether an individual applicant's use was exclusive is a factual one which should be answered by soliciting affidavits and testimony from village inhabitants and others with knowledge of the situation."

In summary, we believe that where the use claimed is berrypicking and the like, the questions which must be examined are whether the use claimed is substantial, and, assuming that this question is answered in the affir-mative, whether that use, giving due consideration to all relevant factors including the situs of the land, was at least potentially exclusive of others. Use of a parcel of land solely for berrypicking can serve as an adequate basis for the grant of a Native allotment where the record estab- lishes that the use was both substantial and potentially exclusive. Thus, to the extent that anything in our prior decision suggests that mere berry- picking is per se inadequate, it must be rejected. In all other respects, however, our prior analysis is reaffirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board's decision styled, Angeline Galbraith, 97 IBLA 132, 94 I.D. 151 (1987), is reaffirmed as explained herein.

James L. Burski
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Franklin D. Arness
Administrative Judge